THE HOMESTEAD RIGHT

AS IT EXISTS IN

NEW HAMPSHIRE.

1901.

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CONCORD, N. H.:
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PREFACE.

The following article on the homestead right comprises our present statutory enactments on the subject, and all the judicial decisions affecting their interpretation, and the nature, extent, and enforcement of the right, that have been made by our courts to date.

It was just a half century ago that the people of the state became impressed with the realization that although all men might be created equal they remained so for only a short time after their creation, and that it was for the public interest that such of them as should become so unfortunate as to need it should be afforded protection for their homes against both their misfortune and improvidence, which would secure to each inhabitant "a house and lot of reasonable value," and thus relieve them from the contemplation of being "occupants of the poor house."

They accordingly sent numerous petitions to the legislature for the enactment of a law to carry out this design.

While the original intention undoubtedly was to confine the exemption to the habitation, the rule of liberal construction which our court early adopted for the interpretation of this class of laws has extended the homestead right to land not dwelt upon, provided it was utilized in some way to contribute to the necessities of life, even to the support of a debtor's cow.

Of the many states where similar laws exist there are no two with like provisions, so that text-books on the subject, or the decisions of the courts of other states, afford little light as to the right as it exists here.

As our court in *Barney* v. *Leeds* expressed it, "the result is a confused and almost inexplicable system, indic-

ative of different intentions, theories, and designs on the part of the lawmakers, with regard to the practical application of the law, expressed, generally, without any very successful attempt at definition of terms or manifestation of meaning and purpose. The inevitable consequence is a conflict of judicial construction and interpretation, but a pretty general agreement of the courts and the legal profession in sentiments of disgust for the unsatisfactory and uncertain condition of this department of jurisprudence."

The various questions which have arisen under the law here since its passage in 1851 have been discussed before our courts by our ablest lawyers, who have given these questions the benefit of their most earnest attention and thorough investigation.

How clearly defined the homestead right and the various methods of its enforcement, occasioned by the numerous conditions under which it is found to exist, have become in New Hampshire, by reason of legislative enactment and judicial interpretation, may be seen by reference to the following pages.

LOUIS G. HOYT.

Kingston, N. H., May, 1901.

CONTENTS.

NEW HAMPSHIRE CASES CITED.

[Date of decisions appears in parentheses.]

STATUTES CITED.

THE HOMESTEAD RIGHT.

The right of homestead exemption being wholly a creation of legislative enactment within fifty years, the common law having no analogous interest or estate, there has been much doubt as to the proper interpretation of the legislative provisions creating homestead exemptions, in this as well as in the other states, occasioning much uncertainty as to the nature, extent, and enjoyment of the homestead right.

REVIEW OF LEGISLATION.—The exemption in the original law of 1851 was "the family homestead of the head of each family," the law giving no definition of its most important terms,—as to what constituted "a family homestead" or as to who was meant by the "head of each family."[1]

Under this act the homestead was held to be exempted from attachment and levy or sale on execution against the owner in his lifetime, and for the benefit not merely of himself, but of his wife, if living, and of his minor children, she being dead, and that upon his decease the widow was entitled to occupy during her life and his infant children during their minority, and that the right being one of occupancy merely could not be transferred.[2]

The law of 1868 materially changed the homestead law by securing the right to "the wife, widow, and children of every person owning and occupying a homestead, for and during the life of such wife or widow and the minority of such children, thereby giving the widow an estate for life,

[1] *Barney* v. *Leeds*, 51 N. H. 261.

[2] Laws 1851, *c.* 1089. Comp. Stat., *c.* 196. *Judge of Probate* v. *Simonds*, 46 N. H. 368.

which could be transferred when set off,[1] but depriving the debtor husband of the right.[2]

The law of 1878 extended the right to the husband, only upon the death of the wife leaving no minor children, or whenever the children should arrive at majority, and to unmarried persons, and gave the husband a homestead in his wife's estate after the children should arrive at full age.[3]

The Homestead Right.—The law (passed in 1891) now provides that

"Every person is entitled to five hundred dollars of his homestead, or of his interest therein, as a homestead right,"[4] and that

"The owner, the husband or wife of the owner, and the minor children, if any, are entitled to occupy the homestead right during the owner's lifetime. After the decease of the owner, the surviving wife or husband of the owner, and the minor children, if any, are entitled to occupy the homestead right during the minority of the children. Subject to the foregoing provisions, the surviving wife or husband of the owner is entitled to the homestead right during the lifetime of said survivor."[5]

The right does not depend upon the character of the title under which the householder possesses his home. The homestead may exist in an estate in fee simple, a life estate,[6] an equitable estate,[7] a leasehold, or a right to receive a conveyance under a bond for a deed.[8]

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[1] *Lake* v. *Page*, 63 N. H. 318.

[2] Laws 1868, *c.* 1, *s.* 33. Gen. Laws, *c.* 138, *s.* 1. *Squire* v. *Mudgett*, 61 N. H. 150.

[3] Laws 1878, *c.* 22, *ss.* 1, 2, 3. Gen. Laws, *c.* 138, *ss.* 1, 5, 6. *Squire* v. *Mudgett*, 61 N. H. 150.

[4] P. S., *c.* 138, *s.* 1.

[5] P. S., *c.* 138, *s.* 2.

[6] *Squire* v. *Mudgett*, 63 N. H. 71.

[7] *Smith* v. *Hall*, 67 N. H. 200. *Pollard* v. *Noyes*, 60 N. H. 184. *Fellows* v. *Dow*, 58 N. H. 21. *Norris* v. *Morrison*, 45 N. H. 490.

[8] *Libbey* v. *Davis*, 68 N. H. 356.

It is universally held that if the estate of the debtor in his home is such that it would be liable to execution in the absence of exemption laws, it is within the contemplation of the legislature in protecting his home from his creditors, whatever the character of his title, but the act only extends to such real estate as is occupied as a homestead, and not to premises let to tenants.[1] Being a life estate it can be conveyed, when set out by metes and bounds, but not before,[2] and the reversion may be taken on execution,[3] but as a person can have but one home at the same time so he can have but one homestead,[4] and independent of statutory provision the proceeds of exempted property is not exempt.[5]

HOW ACQUIRED, RETAINED AND LOST.—By the uniform current of decisions under the homestead acts, occupancy is essential to the existence of the homestead right, and for the purpose of its creation or inception the occupancy must be actual; but when the premises have become invested with the homestead character, and a homestead has been once acquired, a constructive occupancy may be sufficient to retain it, and it will not be lost by a temporary absence with no intention of abandonment. It has some resemblance to the law of domicile, to establish which there must be residence, and the intention of making it the home of the party. Evidence of the mere intent cannot establish the fact of domicile, but when once acquired it may be retained by the intention not to change it. Yet to entitle one to the homestead right it is not essential that a party actually dwell on the land, or that there be any building on the premises in which it is

[1] *Hoitt* v. *Webb*, 36 N. H. 158.
[2] *Lake* v. *Page*, 63 N. H. 318.
[3] *Cross* v. *Weare*, 62 N. H. 125.
[4] *Wood* v. *Lord*, 51 N. H. 448. *Horn* v. *Tufts*, 39 N. H. 483.
[5] *Wooster* v. *Page*, 54 N. H. 125. See Laws 1899, c. 27, on pp. 13, 14 herein.

claimed, if actually used in connection with a house where a party lives, and is necessary to the convenient enjoyment of the house as a home,[1] even though the land be a mile away[2] and the house be hired,[3] but where there is no home on the land and the land is no part of a homestead or connected with one by beneficial use, no homestead right exists. The mere intention to make it a home is not enough,[4] although a debtor in the act of moving in, with some of his goods already in, was held to be entitled to a homestead as against an attachment,[5] but a debtor failed to hold lumber delivered on a homestead lot to rebuild a house that had been destroyed.[6]

The wife is entitled to occupy the homestead during her life, of which she cannot be deprived by a voluntary separation,[7] or the husband's purchase of a doubtful estate in another state,[8] or by her second marriage, whether set off to her or not,[9] or by her separation and applying for a divorce, during the pendency of which her husband died, even as against his grantee,[10] but, unless reserved, a divorce bars her right as well as the right of the minor children decreed to her custody.[11]

The homestead is extinguished by a conveyance and removal,[12] but a party might leave a homestead and take

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[1] *Libbey* v. *Davis*, 68 N. H. 355. *Currier* v. *Woodward*, 62 N. H. 63. *Allen* v. *Chase*, 58 N. H. 419. *Austin* v. *Stanley*, 46 N. H. 51. *Hoitt* v. *Webb*, 36 N. H. 138.

[2] *Buxton* v. *Dearborn*, 46 N. H. 43.

[3] *Rogers* v. *Bank*, 63 N. H. 428.

[4] *Cole* v. *Bank*, 59 N. H. 53 and 321.

[5] *Fogg* v. *Fogg*, 40 N. H. 282.

[6] *Allen* v. *Chase*, 58 N. H. 579.

[7] *Folsom* v. *Folsom*, 68 N. H. 311. *Meader* v. *Place*, 43 N. H. 307.

[8] *Meader* v. *Place*, 43 N. H. 307.

[9] *Miles* v. *Miles*, 46 N. H. 261.

[10] *Atkinson* v. *Atkinson*, 37 N. H. 434.

[11] *Wiggin* v. *Buzzell*, 58 N. H. 329.

[12] *Gerrish* v. *Hill*, 66 N. H. 171.

up a new one for a temporary purpose and with the intention to return without losing the old homestead,[1] and a person moving from his own house on his own land to an adjoining lot owned by his wife, and he and his family continuing to reside there for fifteen years before his death, does not thereby abandon the homestead in his own land, which he continues to cultivate as a farm in connection with his home in the house of his wife, and his widow is entitled to her homestead in this estate of her husband, notwithstanding she owned the house where they both lived.[2]

It is an unequivocal act of abandonment which deprives one of a homestead, such as evinced by a sale, change of domicile, or substitution of another estate elsewhere, and a lease for one year with no evidence of an intended abandonment does not forfeit the homestead,[3] but the question of abandonment is one, ordinarily, of fact for the jury.[4]

If the debtor and wife convey the homestead, which has not been set off, and remove, it is gone, and a creditor attaching prior to the conveyance will take the land free of the right,[5] even though the conveyance is to a party who mortgages back to secure the life support of the grantor, who has not left the premises.[6]

"The money, rights, and credits of the defendant in the hands of any insurance company or its agents, is exempt from trustee process whenever the same is due on account of the loss of, or damage by fire to, any property which by the laws of the state was exempt from attachment, or levy on execution, and the trustee is not chargeable therefor.

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[1] *Wood* v. *Lord*, 51 N. H. 448.

[2] *Nichols* v. *Nichols*, 62 N. H. 621.

[3] *Locke* v. *Rowell*, 47 N. H. 46.

[4] *Wood* v. *Lord*, 51 N. H. 448.

[5] *Brown* v. *Clinton*, 69 N. H. 227. *Beland* v. *Demars*, 68 N. H. 258. *Bennett* v. *Cutler*, 44 N. H. 69.

[6] *Brown* v. *Clinton*, 69 N. H. 227.

Provided, that whenever a building or structure so damaged or destroyed was a part of the homestead, only so much of the amount due therefor shall be exempt as, together with the value of the part of the homestead remaining, if any, shall equal the sum of five hundred dollars.[1]

"Damages recovered for the conversion of property exempt from attachment are exempted from attachment or levy on execution."[2]

"If a husband has willingly abandoned himself from his wife and absented himself from her, or has wilfully neglected to support her, or has not been heard from, in consequence of his own neglect, for three years next preceding her death, he will not be entitled to any interest or portion in her estate, except such as she may have given him in her will."[3]

This provision of the Public Statutes might deprive him of a homestead in her estate under the circumstances mentioned.

Contrary to the decisions in other states, our court has held that a deed signed by the wife bars her dower, although dower is not mentioned in it, but it so held on the ground of a long-continued custom and to avoid disturbing titles, and declared the decision wrong in principle;[4] so it is probable that it would be held that a wife does not release her homestead right by signing her husband's deed, unless the release is expressly mentioned in the conveyance.

Horn v. Tufts Criticised.—In *Horn* v. *Tufts*,[5] the court held that if a husband conveys his homestead, without the concurrence of his wife, and subsequently acquires a new homestead, though of less value, the homestead right of the wife in the former is thereby terminated, and this

[1] Laws 1899, *c.* 27.
[2] Laws of 1901, *c.* —.
[3] P. S. *c.* 195, *s.* 18.
[4] *Burge* v. *Smith*, 27 N. H. 338.
[5] *Horn* v. *Tufts*, 39 N. H. 478.

decision has since remained unquestioned, but in *Atkinson* v. *Atkinson*,[1] decided a year later, it was held that a married woman does not lose her homestead by leaving it with her husband, for it being her duty to follow him he cannot deprive her of the right by moving away, and that it would be inconsistent with the statute to allow a waiver of the homestead without a deed.

Chief Justice Bell,[1] who delivered the opinion of the court in each of these cases, said that "it was inconsistent with the terms of the statute that a conveyance or alienation, by the husband alone, can operate as a waiver or release of the wife's interest; that she is bound by duties to her husband, which require that she should accompany him, if he chooses to change his residence, and that she has no effectual means of opposing his wishes in that respect. He may thus compel her to leave the homestead he has sold, and if her ultimate right to a homestead would be affected by a removal, thus forced upon her, the husband would have the power to put an end to her interest when he pleased, and the object of the statute would be defeated. If it would not, it would seem that no mere removal would operate as a waiver of her right."

If the reasoning of the learned chief justice in *Atkinson* v. *Atkinson* is sound, it is difficult to comprehend how he could arrive at the conclusion he did in *Horn* v. *Tufts*, and deny the wife her homestead right in a homestead she was forced to vacate by the mere fact of the acquirement by the husband of a homestead elsewhere. A designing husband might thus practically deprive his wife of any homestead, either by his purchase of a new homestead of insignificant value, or the purchase of one so heavily encumbered by a mortgage to secure the purchase money that the wife would be unable to redeem it for the protection of her homestead right.

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[1] *Atkinson* v. *Atkinson*, 40 N. H. 249.

In *Nims* v. *Bigelow*,[1] citing and approving *Horn* v. *Tufts*, it is said that "she has parted with one right to resume another of a like nature in the new estate," but she has not voluntarily parted with it,—her husband has forced her to change her domicile by changing his own, and the court visits upon her as a penalty for her fidelity to her marriage relations the forfeiture of her homestead right, supposed to be protected for her against the husband's grants and incumbrances by the most stringent legislative provisions in every homestead enactment since 1851, and against forfeiture by the most liberal construction of these laws in favor of the preservation of the home to the wife, widow, and minor children on the part of our court in all other instances.

It is worthy of consideration as to whether the court under our present law would not limit a wife's forfeiture under these circumstances to cases where the husband had acquired a new homestead of practically the same value, or whether she would not be held to be entitled to an election.

Estoppel.—It has been held that the grantor of the premises demanded in a writ of entry, is estopped at law and in equity, by the covenants of his deed, from setting up a right of homestead therein, as against the grantee, his heirs and assigns, and that the inchoate right of homestead, before the same has been set out, is not such an estate in the land wherein it exists as will bar a writ of entry therefor by the general owner,[2] and in a bill in equity in behalf of the minor children for their homestead in the same premises it was held that they were likewise estopped during the father's lifetime, on the ground that they "claimed through and were identified with him,"[3]

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[1] *Nims* v. *Bigelow*, 45 N. H. 347.
[2] *Foss* v. *Strachn*, 42 N. H. 40.
[3] *Strachn* v. *Foss*, 42 N. H. 43.

but under P. S., *c.* 138, *ss.* 2, 4,[1] neither the wife nor minor children would now be thus estopped.

VALUE, HOW DETERMINED.—The value of the homestead right is not five hundred dollars worth of the premises but five hundred dollars worth of the house-holder's right in the premises, the homestead right of a tenant by the courtesy being five hundred dollars in value of his life estate.[2] The minor children occupying the father's estate by the courtesy would be entitled to a homestead in the life estate until they became twenty-one, and a judgment against the life interest would be conditional that possession be taken when the children became of age.[3] Where the homestead is subject to mortgage the value of the debtor's "interest therein" is the value of the equity of redemption above the mortgage.[4]

ALIENATION.—"The homestead right is exempt from attachment, during its continuance, from levy or sale on execution, and from liability to be encumbered or taken for the payment of debts, except in the following cases: 1, In the collection of taxes; 2, In the enforcement of liens of mechanics and others for debts created in the construction, repair, or improvement of the homestead; 3, In the enforcement of mortgages which are made a charge thereon according to law; 4, In the levy of executions as provided in this chapter."[5]

"No deed shall convey or encumber the homestead right except a mortgage made at the time of purchase to secure payment of the purchase money, unless it is executed by the owner and wife or husband, if any, with the formalities required for the conveyance of land; or, in case the wife or husband is insane or there is a minor child and no wife or husband, unless the judge of probate for the county

[1] *Folsom* v. *Folsom*, 68 N. H. 310.

[2] *Squire* v. *Mudgett*, 63 N. H. 71.

[3] *Squire* v. *Mudgett*, 61 N. H. 149.

[4] *Bank* v. *Rollins*, 63 N. H. 66. *Pollard* v. *Noyes*, 60 N. H. 184. *Tucker* v. *Kenniston*, 47 N. H. 267.

[5] P. S., *c.* 138, *s.* 3.

in which the homestead is situated shall certify on the deed his approval thereof."[1]

"No devise of the homestead shall affect the estate of the surviving wife or husband or minor children in the homestead right."[2]

While the statute makes no provision that the judge of probate upon giving his approval of a sale of an insane wife's or husband's homestead, or that of a minor child, may require that a part of the proceeds of the sale be paid to a guardian for the benefit of the ward, yet the object of the statute being the protection of those unable to protect themselves, it would undoubtedly be within his power, in his discretion, to make such an order, as in proceedings to sell the homestead to pay the debts of a deceased person,[3] or where a guardian releases the homestead right of a wife or husband,[4] he is bound to do, and as under the provisions of the statutes of some of the states he is authorized to do, "when the probate court deems it proper."[5]

While the owner of a homestead cannot convey or encumber it against his wife in her lifetime without her consent, or the approval of the judge of probate, if she is not of sound mind, yet his deed is good subject to the rights of the wife and minor children,[6] although in some jurisdictions his deed, without his wife's joining, is held void not only as a conveyance of the homestead right, but for the residue, and in this state the wife cannot release by a separate deed,[7] nor by a deed without witnesses or seal.[8]

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[1] P. S. *c.* 138, *s.* 4.
[2] P. S. *c.* 138, *s.* 5.
[3] P. S. *c.* 194, *s.* 6.
[4] P. S. *c.* 177, *s.* 17.
[5] Mass. Pub. Stats., *c.* 147, *ss.* 16-18.
[6] *Atkinson* v. *Atkinson*, 37 N. H. 434. *Gunnison* v. *Twitchell*, 38 N. H. 67. *Foss* v. *Strachn*, 42 N. H. 42.
[7] *Dickinson* v. *McLane*, 57 N. H. 31.
[8] *Wilson* v. *Mills*, 66 N. H. 315.

FRAUDULENT TRANSFER.—It is not impossible for a conveyance of a homestead by a party owning the right to be fraudulent and void as to his creditors,[1] and one claiming a homestead, which has not been set out, as grantee under a deed void as to creditors of the grantor is not entitled to retain the same as against those creditors,[2] and cannot maintain trespass, *qu. cl.*, against a creditor of the grantor who has subsequently taken a part of it on execution.[3]

ENFORCEMENT OF THE RIGHT.—(If an Equity of Redemption.) In an equity of redemption the wife has the right to redeem subject to the mortgage only. He who purchases the equity has the right to redeem subject to the mortgage and homestead. If the equity of redemption does not exceed in value the homestead right ($500) it cannot be sold on execution, nor will the grantee of the equity of redemption take anything by his deed.

As against the owner of the equity of redemption the wife has the prior right and superior title. She may redeem from the mortgage and equity will uphold it to protect her homestead interest.

The owner of the equity might redeem from her by paying the wife what she has paid, thereby liberating the homestead from the incumbrance of the mortgage, and securing to himself the estate subject only to her homestead right, which the wife would then be entitled to have set out to her.

If the owner of the equity redeems from the mortgage, his right being subject to the wife's homestead, she can redeem of him, and equity will uphold the mortgage in her hands. If she redeems of him, he must pay her what she has paid to redeem, and he will then hold the whole estate except the homestead.

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[1] *Currier* v. *Sutherland*, 54 N. H. 475. *Gove* v. *Campbell*, 62 N. H. 401.

[2] *Babb* v. *Babb*, 61 N. H. 142.

[3] *Brookfield* v. *Sawyer*, 68 N. H. 406. *Babb* v. *Babb*, 61 N. H. 142.

Her equity being superior to his she will not be bound to contribute to the mortgage, as she would be in dower, and it makes no difference if the mortgagee buys the equity of redemption,[1] but if the administrator of the mortgagor redeems the widow takes her homestead without herself redeeming,[2] and her right to redeem from the first mortgage will not be affected by a second mortgage to which she was not a party,[3] but after foreclosure and expiration of the right to redeem the homestead is barred.[4]

The *dictum* of Judge Fowler in *Gunnison* v. *Twitchell*,[5] that "where, in a second mortgage, the husband and wife have released the homestead right, the second mortgagee may redeem the first mortgage in which the wife did not join, and hold the premises free from the homestead right," would not now apply,[6] if it ever was a sound construction of the law of 1851.

Where a creditor attaches the equity of redemption in a homestead, not set out, and afterwards the debtor and his wife convey the homestead to a third person and remove, the homestead is lost, and the creditor takes the equity free from the homestead.[7]

Levy of Execution.—"The officer required to levy an execution on the debtor's homestead shall cause the homestead right to be appraised and set off to the debtor in the manner land is set off to a creditor, and shall extend the execution on the remainder."[8]

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[1] *Smith* v. *Hall*, 67 N. H. 200. *Pollard* v. *Noyes*, 60 N. H. 184. *Fellows* v. *Dow*, 58 N. H. 22.

[2] *Norris* v. *Morrison*, 45 N. H. 490.

[3] *Smith* v. *Hall*, 67 N. H. 200.

[4] *Richardson* v. *Baker*, 68 N. H. 297.

[5] *Gunnison* v. *Twitchell*, 38 N. H. 62.

[6] P. S., *c.* 138, *s.* 4.

[7] *Beland* v. *Demars*, 68 N. H. 258. *Brown* v. *Clinton*, 69 N. H. 227.

[8] P. S., *c.* 138, *s.* 6.

"The court from which the execution issued, upon application of any party interested in the homestead right, made within one year after the execution is returned, may cause the right to be reappraised by the same appraisers or others appointed by the court and to be set off anew under such instructions as they may give. Return of the proceedings shall be made, and, when approved by the court and recorded in the registry of deeds of the county, shall supersede the prior return and determine the rights of all parties." [1]

"If the appraisers find that a set-off of the homestead right by metes and bounds is impracticable or cannot be made without injury, they shall appraise the entire homestead and make return of their finding and appraisal to the officer, who shall give a copy thereof to the debtor, if there be one, with a notice that if the surplus above five hundred dollars is not paid to him within sixty days, the entire homestead may be set off to the creditor or sold." [2]

"If the surplus is paid, the officer shall apply it on the execution and set off the entire homestead as the homestead right; if it is not paid, the creditor may pay five hundred dollars to the officer, who shall thereupon set off the homestead to the creditor in satisfaction of such sum and of the debt so far as the same will extend." [3]

"If neither the surplus nor the sum of five hundred dollars is paid, the officer shall offer the homestead for sale as equities of redemption are sold on execution, and if more than five hundred dollars is bid, he shall sell the same and apply the surplus above that sum on the execution; if no more than five hundred dollars is bid, he shall not sell it, but shall make return of the facts and cause the same to be recorded, and the property so offered for sale shall thereby become the homestead right to the extent of its value." [4]

"The officer shall pay the five hundred dollars received by him of the creditor, or derived from the sale, as the debtor and wife or husband, if any, or if there be none, as the debtor and the guardian of the minor children of the

[1] P. S., *c.* 138, *s.* 7.
[2] P. S., *c.* 138, *s.* 8.
[3] P. S., *c.* 138, *s.* 9.
[4] P. S., *c.* 138, *s.* 10.

debtor may agree in writing; if they do not agree, he shall deposit the money with the clerk of the (superior) court, who shall pay the same as the court, or any justice thereof, upon application, may order." [1]

"The officer shall make return on the execution of his doings under this chapter, and shall cause the execution and his return to be recorded in the registry of deeds. If the same are recorded on or before the return day of the execution, the homestead right, as herein provided, shall be established against all persons; otherwise as against the creditor and his heirs until the record is made, subject, however, to the provisions of section seven." [2]

"If the officer about to levy an execution upon land in which a homestead right is or may be claimed is notified in writing by the creditor that he denies the existence of the right, the officer shall forthwith return the execution, with the notice, to the clerk's office from which it issued." [3]

"Upon petition of the creditor, the court may hear the parties interested, as in equity cases, determine whether there is a homestead right in the premises, and make such orders and decrees as justice requires." [4]

"Upon a final decree on such petition, the clerk shall immediately issue a new execution having a certified copy of the decree thereon; and the creditor's lien acquired by attachment or by the commencement of a levy shall remain in force until the expiration of thirty days after the decree is made." [5]

It is imperative for an officer to set off a homestead, upon application, in the service of an execution, and if he fails to do so the levy is void as against the owner of the homestead, and being void as to the homestead it is void as to the residue.[6] Yet the debtor does not lose his right by failure to request a set-off, and in the latter case where

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[1] P. S., *c.* 138, *s.* 11.
[2] P. S., *c.* 138, *s.* 12.
[3] P. S., *c.* 138, *s.* 13.
[4] P. S., *c.* 138, *s.* 14.
[5] P. S., *c.* 138, *s.* 15.
[6] *Kensell* v. *Cobleigh*, 62 N. H. 298.

the estate is of greater value than five hundred dollars the same could be set off "subject to the homestead right," in which case the creditor and debtor would be tenants in common,[1] but where the execution is levied as if there were no homestead, the land being set off at $339, no demand being made, an action of trespass *qu. cl.*, as well as a writ of entry, can be maintained by the creditor against the owner of the homestead right until the same has become vested by being set off, and even though the whole real estate is of less value than five hundred dollars it does not change the result, for the only way the value of the premises as a homestead can be ascertained, is upon a proceeding, in some of the ways provided by law, to have the homestead set out and assigned,[2] and upon a levy on an execution against the husband, who had deeded the land to his wife, the deed being claimed to be in fraud of his creditors, the wife, under a claim of owning the same as a homestead, no homestead having been assigned, cannot maintain trespass *quare clausum* against the husband's creditor, who has set off the land upon an execution in his favor.[3]

If a debtor demands his homestead and the officer recognizes it to the extent of appointing appraisers to set it off and receiving their report, he cannot afterwards ignore the demand, but his subsequent proceedings must conform to the homestead law,[4] and in levying on a homestead right in an equity of redemption, where a demand is made, the officer should appraise the equity and not the real estate as if there were no mortgage, and a demand would apply to such executions as the officer then had to be levied, although the demand only named one execution.[5]

In cases where the homestead is of greater value than

[1] *Bank* v. *Rollins*, 63 N. H. 66. *Barney* v. *Leeds*, 51 N. H. 253.
[2] *Tidd* v. *Quinn*, 52 N. H. 341.
[3] *Babb* v. *Babb*, 61 N. H. 142.
[4] *Hall* v. *Johnson*, 64 N. H. 481.
[5] *Bank* v. *Rollins*, 63 N. H. 66.

five hundred dollars and no demand is made to have it set off, and it is set off, "subject to a homestead of five hundred dollars in value," the levy will hold its value in excess of the exemption, and the owner of the homestead and owner of the residue will each have a right to immediate possession and enjoyment of the land, and the owner of the residue may maintain a writ of entry to recover the land, and he will take judgment thereon for a writ of possession, subject to the defendant's homestead of five hundred dollars in value; to take effect after the termination or separation of the homestead estate, and the committee appointed by the superior court to make a division upon a petition for partition will assign the homestead by metes and bounds of the value of five hundred dollars, estimated at the date of the completion of the levy, rather than at the date of partition,[2] and where the appraisers upon the levy of the execution returned the value of the whole estate at six hundred dollars, the value determined by them is a conclusive determination of the value of the estate at that time, and, if capable of division, the committee of partition, without regard to their own views as to value, must set off five sixths to the debtor, and one sixth to the creditor, and if not capable of division the superior court has power to order a sale and an equitable division, where the statute fails to provide for such a contingency.[2] Now provided for by Pub. Stat. *c.* 243, *ss.* 24, 25, 26.

As the mode of levying an execution must be determined by the nature of the debtor's title at the time of levy, and not at the time of attachment (as in the case of premises abandoned as a homestead between the time of attachment and levy[3]), Judge Bellows in *Fogg* v. *Fogg*[4]

[1] *Barney* v. *Leeds*, 51 N. H. 253.
[2] *Barney* v. *Leeds*, 54 N. H. 128.
[3] *Beland* v. *Demars*, 68 N. H. 258.
[4] *Fogg* v. *Fogg*, 40 N. H. 282.

suggested that the question of exemption, in the absence of fraud, ought possibly to be determined by the conditions existing at the time of levy, rather than at the time of attachment, in which case it might be possible for a debtor to hold a homestead in premises against a levy that he was not entitled to at the time of attachment, but we would hardly expect the court to so hold.

When an execution is levied upon a homestead, understanding it has been abandoned, and it proves to be subsisting, and the levy therefore fails, the creditor can bring an action of debt under Pub. Stats., *c.* 216, *s.* 5.[1]

Jurisdiction of Superior Court.—"The superior court, upon petition of the owner of a homestead, or the wife, husband, or guardian of the minor children of such owner, or upon petition of a judgment creditor and such notice as it may order, may appoint appraisers and cause the homestead right to be set off, and, a record of the proceedings being made in the registry of deeds, the right shall be established as against all persons."[2]

While a petition for partition in the superior court is a proper proceeding to obtain an assignment of a homestead held in common with others, which could not be defeated because the petitioner had never asked to have his homestead set out,[3] yet a petition under the above statute would be as appropriate, and in a bill in equity by the widow it is proper, if not necessary, to make the minor children parties.[4]

The superior court may set off the homestead upon the petition of the wife against the husband, notwithstanding a voluntary separation between them, on the ground that it may be as important for her protection against her

[1] *Whittemore* v. *Carkin*, 58 N. H. 576.
[2] P. S., *c.* 138, *s.* 16.
[3] *Atkinson* v. *Atkinson*, 37 N. H. 434.
[4] *Miles* v. *Miles*, 46 N. H. 261. *Hale* v. *Jaques*, 69 N. H. 411.

husband and those claiming under him as against his creditors.[1]

A second mortgagee, in which the husband and wife joined, cannot compel the holder of the first mortgage, in which the wife did not join, to set him out a homestead.[2]

Jurisdiction of Probate Court.—The jurisdiction of the probate court[3] to set off a homestead is now limited to the homestead as part of the estate of a deceased person, of which he died seized, and perhaps in cases where there is no dispute about the title,[4] and in setting off in probate proceedings in cases where the homestead is subject to mortgage, it was held in *Norris* v. *Moulton*[5] that in making the assignment the estate is to be valued as though it were free from the mortgage, and such is now the practice in some counties, and in *Norris* v. *Morrison*[6] it was held that the owner of the homestead right was bound to contribute as in dower to the payment of the mortgage. It is now held that she is not bound to contribute,[7] and as the value of the homestead right is not so much land but so much of the debtor's interest in it, it is evident that the probate court should set out the homestead right in an equity of redemption as it is set out by an officer in the levy of an execution, or by the superior court,—that is to say, five hundred dollars worth of the deceased householder's right in the premises (in the equity) should be set out to those entitled to the homestead right, and in light of decisions defining the right made since the time of *Norris* v. *Moulton* it is evident that that decision would

[1] *Folsom* v. *Folsom*, 68 N. H. 311. *Tidd* v. *Quinn*, 52 N. H. 344.

[2] *Gunnison* v. *Twitchell*, 38 N. H. 62.

[3] P. S., *c.* 197, *s.* 1; *c.* 185, *s.* 2.

[4] P. S., *c.* 243, *s.* 18. *Horn* v. *Tufts*, 39 N. H. 478. *Tidd* v. *Quinn*, 52 N. H. 343.

[5] *Norris* v. *Moulton*, 34 N. H. 399.

[6] *Norris* v. *Morrison*, 45 N. H. 490.

[7] *Pollard* v. *Noyes*, 60 N. H. 184.

not now be considered authority as to the manner of setting out a homestead by the probate court. The homestead right cannot be one thing in the probate court and another thing in the superior court. The inchoate right, whatever it is, when set out must be the same in one court as another.

In a petition to have a homestead set out from the estate of a deceased person a dispute about the title does not oust the judge of probate of jurisdiction. Our statutes make a distinction between a division between co-heirs and co-devisees and partition between tenants in common, and provide for different sources of title for the shares of the several owners, where the heirs petition as such and not as tenants in common, and in the former case the probate court has jurisdiction notwithstanding a dispute about the title,[1] although its jurisdiction is not exclusive,[2] but as the court would not have jurisdiction in the division of property of which the husband did not die seized the probate decree would not affect the right of the true owner, if it should afterwards appear that the property did not belong to the deceased at the time of his death,[3] and the owner could bring a writ of entry and recover possession.[4]

The committee appointed under the statute have power to give a right of way by pass-ways in existence and use, if found to be beneficial and convenient.[5]

The report of the committee to set out the homestead will not be set aside or rejected either by the probate court, or the superior court on appeal, merely because the judgment of the committee seems to the court to be erroneous in its estimate of value, and no evidence will be received to show that fact. The committee's findings are

[1] *Phillips* v. *Perry*, reported in note in 49 N. H. 264.
[2] *Kelley* v. *Kelley*, 41 N. H. 503.
[3] *Jillson* v. *Wilbur*, 41 N. H. 106.
[4] *Fisk* v. *Eastman*, 5 N. H. 240.
[5] *Cheswell v. Chapman*, 38 N. H. 14.

conclusive, if regular and without error in law, and will be considered as a jury verdict and not set aside "unless it was influenced by passion, prejudice, partiality, or corruption, or unwittingly made under a plain mistake,"[1] although it was formerly held that it was a valid objection to the acceptance of the report that the division made by the committee was "unequal and inconvenient,"[2] but it must appear by the committee's report that they were sworn before proceeding to a hearing, and if they were not so sworn their report will be set aside, and the matter will not again be referred to the same committee but a new committee will be appointed.[3] If the committee is sworn after posting notices but before the hearing, objection should be made by the parties appearing before them at the hearing, if known to them, otherwise the objection will be considered as waived.[4]

Where the committee in their report certify that in their opinion the homestead cannot be set off without great prejudice, they have authority to proceed under Public Statutes, *c.* 197, *s.* 5, and to appraise the whole homestead when of greater value than five hundred dollars, giving a general description thereof, and to make return of their doings. If the report shall be approved by the judge, and the parties interested shall consent, the judge may assign the whole, in the words of the statute, "to one or more of the heirs or devisees," they paying to the others their respective just shares of the appraised value, or giving bonds to the judge, with sufficient sureties, to pay the same, with interest, at such periods as he shall order.[5]

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[1] *Doughty* v. *Little*, 61 N. H. 368.
[2] *Morrill* v. *Morrill*, 5 N. H. 329.
[3] *Ela* v. *McConihe*, 35 N. H. 279. *Pickering* v. *Pickering*, 20 N. H. 544.
[4] Petition of Gilford, 25 N. H. 124.
[5] P. S., *c.* 197, *s.* 5.

It will be noticed that the section quoted authorizes the assignment "to one or more of the heirs," and it is presumed that the word "heirs" as here used should be interpreted in its broader sense as including any of those named in section one of the chapter,—the widow, the owner of the homestead right, any or all the heirs or devisees in the real estate of a person deceased, or in any part of it.[1]

In *Norris* v. *Moulton*[2] the court practically held that the entire chapter was intended to cover those who were entitled to a share in the estate under our statute of distributions, whether "heirs" in the strict legal sense or not, and that this chapter giving the judge of probate jurisdiction in the "division of real estate among heirs and devisees"[3] was intended to give him power to assign to the widow, who would not be a legal "heir,"[4] not merely her share in the estate such as it was declared to be by the laws existing at the time of the passage of the act, but also such as it might become by subsequent legislation, and that the different sections of the chapter set forth the manner in which her share should be assigned.

"With the consent of the parties interested" the judge would doubtless have authority to assign the whole homestead, if of greater value than five hundred dollars and incapable of division, to the widow as an "heir" within the contemplation of the statute, she paying to the others interested "their respective just shares of the appraised value," or to assign to the husband under similar circumstances, he claiming a homestead in the real estate of a deceased wife.[5]

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[1] P. S., *c.* 197, *s.* 1.
[2] *Norris* v. *Moulton*, 34 N. H. 392.
[3] Title to Ch. 197, P. S.
[4] *Richardson* v. *Martin*, 55 N. H. 45.
[5] *Barney* v. *Leeds*, 54 N. H. 145.

When the parties will not consent to a division the proceedings might be the same as in a petition for partition, and the probate court could order the petitioner to enter the case in the superior court,[1] where it would proceed as if originally commenced there.[2]

Although the judge of probate is authorized to proceed, at his discretion, in the assignment of the homestead right without notice,[3] yet where it is desired that his decree shall conclude all parties as to the right, it will be advisable that notice be given as required in chapter 197, Public Statutes, for "it is a principle of natural justice, generally recognized in law, that a party should have notice of a legal proceeding by which his rights may be concluded."[4]

"It is a first principle of justice, everywhere recognized, that no judgment or decree affecting the rights of any person, or by which his rights may be concluded, shall ever be rendered without notice to him of the proceeding."[5]

The authority of the probate court in relation to the division of real estate is purely statutory, and is, of course, limited in all the steps of its proceedings by the statutes. Its proceedings within its legitimate province are valid and binding upon all parties interested in an estate, until they are regularly reversed upon appeal, its decree, unless reformed,[6] even preventing an heir not named in a decree

[1] P. S., *c.* 243, *s.* 27.

[2] P. S., *c.* 243, *s.* 28.

[3] P. S., *c.* 185, *s.* 2.

[4] *Parker* v. *Gregg*, 23 N. H. 423. Either actual or constructive.

[5] *Brown* v. *Sceggell*, 22 N. H. 552.

[6] The probate court, upon petition of parties entitled to relief, can modify or vacate its decrees and do justice in appropriate proceedings, where there is fraud or error in the settlement of estates. *Ayer* v. *Messer*, 59 N. H. 280. *Metcalf* v. *Gilmore*, 59 N. H. 436. *Parker* v. *Gregg*, 23 N. H. 416. The vacating of a decree could not, of course, affect an administrator who had acted "upon the faith of such a decree." *Gay* v. *Smith*, 38 N. H. 171. *Gorrill* v. *Whittier*, 3 N. H. 265.

of distribution from participating in a decedent's estate,[1] and it is of vital importance that the statutory requirements as to notice and the appointment of agents and guardians be strictly complied with, or its proceedings are without its jurisdiction, illegal and void.[2]

The effect of a probate decree in the assignment of a homestead is illustrated in *Judge of Probate* v. *Simonds*,[3] where a widow in an insolvent estate petitioned the probate court for an assignment of her homestead, which upon due notice was granted, without objection, and the same was assigned, the supreme court held it was too late for a creditor whose debt was contracted before the passage of the homestead act and so was superior to the homestead right, to object in that court to the previous assignment by the probate court after it had been made; that he might have there insisted that no assignment should be made till his debt was paid, having the right to appeal from an adverse decree, but having there failed to assert his rights he was bound by the decree of that court as to the widow's right to have her homestead assigned; that being one of the questions that was properly before the court for determination, its decree was final unless appealed from.

It is not only important that objection be made to proceedings in the probate court where rights are desired to be contested, but that the objection be taken in season, for neglect in this particular may be considered as a waiver of the question.[4]

CONSTITUTIONALITY.—It is held here and elsewhere that the right to a homestead exemption, and its quality and extent, as against creditors, are to be determined by

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[1] *Starkey* v. *Kingsley*, 69 N. H. 293.

[2] *Brown* v. *Sceggell*, 22 N. H. 548. *Merrill* v. *Harris*, 26 N. H. 142.

[3] *Judge of Probate* v. *Simonds*, 46 N. H. 368.

[4] *Ela* v. *McConihe*, 35 N. H. 279.

the law which was in force when their debts were created, for otherwise it would be a violation of the United States constitution prohibiting any state from passing a law impairing the obligation of contracts.[1]

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[1] *Murray* v. *Trumbull*, 67 N. H. 281. *Ladd* v. *Dudley*, 45 N. H. 61. *Strachn* v. *Foss*, 42 N. H. 43.